

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	
Competition in the Market for the)	MB Docket No. 05-255
Delivery of Video Programming)	

COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

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September 19, 2005

EXECUTIVE SUMMARY

Public television stations are the last true bedrock of locally controlled free, over-the-air media. Public television stations in this nation are local in structure and mission, licensed to numerous local communities and local and state institutions, and relying on local financial donations for a significant portion of their daily operations. Moreover, public television's outreach efforts extend beyond the television screen to education and community involvement on a local level. As public television stations transition to digital operations, they face unprecedented challenges as well as unique opportunities to extend their public service mission through the transmission of multiple educational programs and public safety services.

However, public television stations cannot do it alone and unaided. They need critical federal funding and policy support to make the promise of local digital services a reality. Early this year, APTS and the National Cable and Telecommunications Association (NCTA) announced an historic agreement ensuring that local public television stations' digital programming will be carried on cable systems serving the vast majority of the nation's cable subscribers. And APTS looks forward to positive discussions with the American Cable Association for a negotiated solution to digital carriage on smaller cable systems. However, public television requires digital carriage on other multichannel video programmer platforms as well, including carriage on Direct Broadcast Satellite and RBOC-deployed fiber –TV platforms.

APTS has argued in other proceedings before the Commission that the Commission should promulgate rules to ensure the fair and full carriage of local digital signals on direct broadcast satellite systems. Digital carriage is clearly consistent with

the plain language of the carry-one / carry-all construct of federal law. Moreover, with over 20 percent of television households subscribing to satellite, digital carriage is an important means to speed the digital terrestrial television transition. This policy is also consistent with federal policy mandating that public television have access to all telecommunications technologies. Lastly, information provided by satellite companies to the federal Securities and Exchange Commission, and other reputable sources, amply demonstrates that both EchoStar and DIRECTV are rushing to compete with cable by expanding their already substantial satellite capacity to distribute digital programming to their customers.

DIRECTV, for instance, currently holds licenses to broadcast from 46 of 96 DBS frequencies allocated to it and holds an additional 64 Ka-band licenses as well. It currently operates a fleet of seven satellites, leases an additional satellite, and will operate a total of seven *additional* satellites, including two already launched this year for the purpose of digital carriage. DIRECTV plans to roll out HD delivery of local channels in 12 markets in the Fall of 2005 and by the end of this year expects to have local HD carriage in 30-40 markets.

Similarly, EchoStar also has plans to significantly expand its already extensive capacity to carry local digital signals in 20-30 markets. EchoStar currently has licenses to transmit on 96 DBS frequencies and has or leases additional licenses in the FSS band for 56 additional frequencies. In addition, EchoStar was the winning bidder for the remaining 29 DBS frequencies at the 157 degree orbital location in 2004. The company owns and operates nine in-orbit satellites and leases an additional three satellites from SES Americom. Echostar also has contracts for the construction and launch of four new

satellites and has entered into satellite service agreements to lease capacity on two additional satellites that are under construction. EchoStar also possesses newly approved licenses for two new satellites in the “extended Ku-band,” possesses Ka-band licenses at 97°, 113° and 117° WL, and has purchased 11 DBS frequencies at 61.5° from Cablevision’s HD satellite VOOM service (using the Rainbow 1 satellite).

Moreover, recent technical submissions to the FCC and Congress have demonstrated that there are additional technologically feasible means to deliver terrestrial digital signals via satellite. These include: spectrum sharing, use of Ka-band, higher-order modulation and coding and compression, closer spacing of Ku-band DBS satellites, and satellite dishes pointed at multiple orbital slots.

Public television also requires digital carriage on RBOC-deployed fiber –TV platforms. As the Regional Bell Operating Companies (RBOCs) enter the multichannel video programming market by providing services that function in the same ways as cable, they should be regulated like traditional cable systems by the Commission, including the application of mandatory carriage provisions pursuant to Section 615 of the Communications Act. RBOC-deployed fiber will provide a carrying capacity that far outstrips either cable or satellite, allowing for carriage of public television digital signals without any unfair imposition on its infrastructure. Arguments by SBC that its fiber-TV service somehow falls outside the scope of the four exclusive means by which a telecommunications carrier can provide video services to the public fails on a clear reading of the plain language of Section 651 of the Communications Act. Because neither Verizon’s nor SBC’s multichannel video service will be *solely* designed to provide an interactive experience, the service remains the functional equivalent of a cable

service and should be regulated as such. APTS argues that mandatory carriage provisions of Section 615 of the Communications Act should apply, and that this means full and fair carriage of all multicast streams. While the Commission may have been constrained in its reading of the “primary video” language as it considered the Constitutional implications of this language as it applied to cable, no such Constitutional constraints exist as applied to RBOC-deployed fiber-TV, because the carrying capacity is so much greater than a typical 750 MHz cable plant.

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COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

The Association of Public Television Stations (“APTS”)¹ hereby submits Comments in the above captioned proceeding. As APTS has previously submitted, public television stations represent the last true bedrock of locally controlled free, over-the-air media.² Public television stations in this nation are local in structure and mission, licensed to numerous local communities and local and state institutions, and relying on local financial donations for a significant portion of their daily operations. Moreover, public television’s outreach efforts extend beyond the television screen to education and community involvement on a local level. As public television stations transition to digital operations, they face unprecedented challenges as well as unique opportunities to extend their public service mission through the transmission of multiple educational programming and public safety services.

However, public television stations cannot do it alone and unaided. They need critical federal funding and policy support to make the promise of local digital services a

¹ APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation’s 356 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

² Comments of the Association of Public Television Stations, Docket MB 04-233 (Nov. 1, 2004).

reality. Early this year, APTS and the National Cable and Telecommunications Association (NCTA) announced an historic agreement ensuring that local public television stations' digital programming will be carried on cable systems serving the vast majority of the nation's cable subscribers. And APTS looks forward to positive discussions with the American Cable Association for a negotiated solution to digital carriage on smaller cable systems. However, public television requires digital carriage on other multichannel video programmer platforms as well.

APTS has argued in other proceedings before the Commission that the Commission should promulgate rules to ensure the fair and full carriage of local digital signals on direct broadcast satellite systems.³ Moreover, as the Regional Bell Operating Companies (RBOCs) enter the multichannel video programming market by providing services that function in the same ways as cable, so too should they be regulated like traditional cable systems by the Commission, including the application of mandatory carriage provisions pursuant to Section 615 of the Communications Act.

I. Public Television Distributes Innovative Noncommercial Educational and Public Safety Services Through Its Uniquely Local Presence in American Communities

Pursuant to Federal policy, the purpose of public television stations is to serve the public interest by providing educational and informational services to their local

³ See Association of Public Television Stations, Letter to Michael K. Powell, CS Docket Nos. 98-120, 00-96 (May 10, 2004); Association of Public Television Stations, Letter to Michael K. Powell, CS Docket Nos. 98-120, 00-96 and CSR-5865-Z (October 29, 2004); and Association of Public Television Stations, Letter to Michael K. Powell, CS Docket Nos. 98-120, 00-96 (January 25, 2005).

communities.⁴ The public television “system” in this country is, by design, decentralized. The 356 local public television stations are operated by local community foundations, colleges, universities and school districts as well as locally-responsive state commissions. In addition, all public television stations not affiliated with governmental entities possess community advisory boards that allow direct feedback from the community regarding performance and adherence to public television’s mission.⁵ Moreover, daily operations are directly funded by donations from local viewers, ensuring community responsiveness in a very concrete financial way. In fact, one-quarter of public television’s funding comes from individual donations, while only about 15 percent of funding comes from the Federal Government. The balance is funded by local businesses, state and local governments, local colleges and universities, and foundations.

Because of its inherently local structure, public television programming is responsive to the communities these stations serve. As the Senate Commerce Committee has recently observed:

Public broadcasting stations exercise complete discretion over programming decisions – all licensees are owned and controlled at the local level. This structure is due, in part, to the institutional and financial factors that motivated the founding of each individual public television station. Unlike commercial television stations, which typically involve business-related investment decisions, establishing a public television

⁴ 47 U.S.C. §§ 396(a)(5) ([I]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation”); 396(a)(6) (“[I]t is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities”); 396(a)(8) (“[P]ublic television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs”).

⁵ Other than states, political or special purpose subdivisions of a State or public agencies, all public television licensees must have a Community Advisory Board in order to receive CPB grants. 47 U.S.C. § 396(k)(8)(A).

station entails a local-level commitment to the education and cultural enrichment of viewers.⁶

In this regard, the Senate Commerce Committee further observed that “the locally owned and controlled public broadcasting stations are models of local service in their communities” because they “control their own programming content and schedules and tailor them to the interests of their communities.”⁷

II. Public Television Uses its New Digital Transmission Technology to Bring Innovative Noncommercial Educational Broadcast Services to American Communities in High Definition and Multicast Standard Definition

With the conversion to digital broadcasting, public television can continue this legacy of service and can accomplish so much more. The inherent flexibility and capabilities of digital television will enable public television stations to deliver a number of enhanced services to the public in ways that could only be dreamed of in the analog world. Responding to their community needs, public television stations are offering a mixture of high-definition programming and multiple standard-definition programming.

A. High Definition Programming

Public television stations receive high-definition programming for distribution from a number of sources, including PBS and other distributors, as well as locally-produced HD content. In calendar year 2005, PBS will be distributing 125 hours of high-definition content, including a wide range of science and performance genres, and will

⁶ Public Broadcasting Reauthorization Act of 2004, Report of the Committee on Commerce, Science and Transportation on S. 2645, S. Rep. No. 108-396 (2004) at 3.

⁷ Id. at 10.

also be distributing 290 hours of widescreen formatted digital programming throughout the year. In addition, American Public Television (APT) will be supplying 91 hours of HD programming each month to public television stations. This represents eight ongoing series, complemented by new and returning specials.⁸

B. Multicasting

Public television stations are also taking advantage of digital television's technological flexibility by broadcasting multiple program streams to bring new services to the public that could not be made available under the constraints of a single analog program stream. These include an expanded distribution of children's programming, formal educational services and workforce development services, locally-oriented public affairs programming, and programming addressed to traditionally unserved or underserved communities.

Building upon more than three decades of experience, and the trust of millions of parents, numerous public television stations offer a separate 24-hour multicast channel devoted to children's programming. Often designed specifically to meet state standards of learning, this programming is a mix of nationally-distributed and locally produced programming that meets the unique educational needs of children in our local communities.

More than 95 percent of public television stations have committed to broadcast at least one multicast channel dedicated to formal educational programming. Typically, public television's educational programming will emphasize a combination of adult

⁸ <http://www.aptonline.org/aptweb.nsf/vPrograms/Index-APT+HD+Programming>.

continuing education, K-12 instructional programming, workforce development/ job training and college telecourses. For instance, public television stations in Florida now regularly devote a multicast channel to programming distributed through the Florida Knowledge Network, which is funded by the State Department of Education.

Numerous public television stations also plan to multicast a digital channel dedicated to public affairs and local issues. These multicast channels will provide gavel-to-gavel coverage of state legislatures, coverage of local town meetings and debates, and highlight local business, lifestyle, cultural events and political issues. For instance, like many of its sister public television stations, South Carolina Educational Television offers a DTV multicast channel devoted to the culture and arts of South Carolina, including unique coverage of the South Carolina General Assembly. Other stations in Minnesota, Colorado, Kentucky, Louisiana and Tennessee, among others, plan similar services.

Still other multicast plans include targeting broadcasts at traditionally underserved communities. Several public stations will dedicate a multicast channel to foreign language programming, including the only source of noncommercial educational Spanish-language programming. Other public stations are also considering dedicating programming for the needs of the senior community.

Most recently, Channel Thirteen (New York) and WGBH (Boston) have teamed up to create two new channels of multicast digital programs that have the potential for national distribution to supplement local multicast efforts. WORLD is a non-fiction service that offers viewers a window on the world, to know what's going on in their own backyard, across the country, around the world, or even what new discoveries are unfolding in the reaches of outer space. World includes popular, award-winning public

television series that explore issues of local, national, and international relevance and tell stories of our past, our present and our future. CREATE invites viewers to take a hands-on approach to life through a "do-it-yourself" library of series and specials on cooking, renovating, collecting, painting, crafts, travel, gardening, and more. Both channels will be available for distribution to local public television stations in the near future.

III. Public Television Extends the Reach of Its Educational Broadcast Mission Through Effective National and Local Outreach Initiatives

Pursuant to their mission to serve their local communities,⁹ public television stations across the nation have provided not only a mix of national, regional and local programming, but have also engaged in local partnerships and outreach efforts to extend education beyond the television screen.

For instance, the National Center for Outreach,¹⁰ through funding provided by CPB, assists public television stations in facilitating meaningful outreach to local communities and helping to foster and deepen existing community partnerships by supporting stations' outreach missions; communicating opportunities; advancing best practices; sharing resources; training new and experienced outreach professionals; funding local outreach with annual grants; and organizing national meetings to enhance local outreach.

In addition, through its Ready To Learn initiative, public television has contributed toward our nation's most urgent educational goal— ensuring that all children begin school ready to learn. The core of Ready to Learn is to provide non-violent,

⁹ 47 U.S.C. §396(a)(8) (“[P]ublic television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs”).

¹⁰ <http://www.nationaloutreach.org/>.

commercial-free, educational children's television programming broadcast free of charge to every American household. Through its network of local public television stations, Ready To Learn (RTL) coordinators have made these characters come to life by reading to children in their communities and providing extensive outreach services to parents, child care providers and other early childhood professionals.¹¹ In addition to the millions of children reached nationwide through broadcasting, public television RTL provides the following:

- 650,000 parents and early childhood professionals have participated in 20,000 community-based Ready To Learn workshops on using television wisely, developing children's learning skills and preparing children to read.
- Approximately 7 million children have benefited from their parents' and teachers' participation in Ready To Learn outreach services.
- And over a million free, new books have been distributed through public television RTL to disadvantaged children.

In addition, local public television stations independently conduct efforts to enhance their local programming with effective community outreach services. These include additional efforts to enhance early reading, to provide support for child care professionals, to address issues of local concern for older Americans, to provide worker retraining, to enhance democracy and to respond to community crises. In this way, the noncommercial educational services public television stations provide extend beyond the television screen.

¹¹ See www.pbs.org/readytolearn.

IV. Public Television Offers Non-Broadcast Transmission of Educational Data Services

Public television transmitters also have the potential to provide localized noncommercial educational services over a broadband-like digital infrastructure to all Americans. The inherent flexibility of digital broadcast technology can allow for the delivery of data at extraordinary speeds in conjunction with a multicast television experience. This extraordinary data delivery mechanism, in conjunction with other technologies designed to provide a return path capability, can facilitate the delivery of high-quality noncommercial educational services through a broadband-like pipe.

For instance, New Jersey Network's 21st Century Digital Classroom initiative employs datacasting to deliver media rich video content over the air to students, teachers, and adult learners in the classroom. Educational videos from multiple libraries are accessed on classroom computers and are available through one easy-to-use portal. Content includes multimedia K-12 curricula, professional development, adult education and workforce training materials. NJN also datacasts workforce training programs to several sites around the state that are part of its New Jersey Workforce Learning Link program, a groundbreaking partnership with the New Jersey Department of Labor in which it uses a variety of technologies, including its digital television signal, to deliver work force training materials to welfare recipients, dislocated workers and other job seekers to designated sites in New Jersey.

Similarly, WHYY in Philadelphia is datacasting materials that also focuses on adult basic education. Using a combination of national and local programming, WHYY has digitized 58 half-hour video segments and over 700 pages of text for delivery to desktop computers. These computers have the capability to receive and store datacast

transmission and have been placed -- in partnership with the Workforce Investment Boards of Chester, Philadelphia, Delaware and Montgomery Counties -- in libraries, hospitals, community centers and colleges in locations easily accessible to the targeted population.

V. Public Television Uses Its Digital Transmission Facility to Enhance National, Regional and Local Public Safety

A fully digitized public television system offers significant new public safety advantages. In this regard, public television's congestion-free bandwidth can support public alert systems as well as closed networks to enable public safety and emergency management agencies to securely transmit critical, time-sensitive information. These services are provided through a technology called "datacasting," whereby data originating from a public safety agency would be received by a local PTV station, which then encrypts the data, inserts it into the digital TV signal, and sends the packet through its digital transmitter to personal computers or local area networks equipped with an inexpensive DTV tuner card and a small antenna. The data can consist of video, text, audio, graphs and maps.

A datacasting system of this type provides many advantages to public safety agencies. First, transmission of the data over the digital broadcast signal is nearly instantaneous, compressing minutes of alert time and information lags to just a few seconds. Second, this infrastructure can bypass the congestion common to wireline and wireless services, such as the Internet, telephone and cellular networks. Third, the system is "addressable" so that public safety agencies can pinpoint to whom the data is sent, whether to relevant agencies, mobile units, or first responders in the field. Lastly,

because public television stations reach nearly every American household, the digital infrastructure – once fully built out – could supplement the digital broadcast Emergency Alert System as a national alert system to reach all homes, schools, hospitals and businesses via computers.

A. Local Examples

Several public television stations and state networks have already pioneered local public safety datacasting networks. For example:

- Kentucky Educational Television (KET), in partnership with the local branch of the National Oceanic and Atmospheric Administration (NOAA), commissioned the development of software that allows it to use its digital broadcast capacity to immediately send emergency storm alerts, weather information, criminal profiles and updates, and other time-sensitive materials instantaneously to computers around the state.
- Channel Thirteen/ WNET in New York City is leading the way in prototyping a new broadband emergency alert system capability using their digital transmitter located on the Empire State Building. WNET-DT will use a portion of their digital spectrum in order to develop a system to capture, integrate, disseminate and display video, other sensor data, and multi-source intelligence data to support special operations for urban environments, perimeter defense, homeland defense emergency response systems and emergency broadcast systems. The project will demonstrate how first-responders will receive high-value information that will improve their ability to perform critical functions during an emergency. This end-to-end system design and demonstration will incorporate a variety of technologies such as Ad-Hoc Networked Unattended Ground Sensors (UGS), portable/mobile COFDM receivers, in-band return path, real-time Error Resilience, MPEG4 encoding/streaming, and embedded multimedia players. As a terrestrial broadcast television licensee, Thirteen/WNET will support the project by combined use of datacasting over its DTV facility with use of its Instructional Television Fixed Service (ITFS) license to provide two-way communications for public safety officials and first-responders.
- New Jersey officials and the New Jersey Network (NJN) are working together to use datacasting send vital information – evacuation instructions, bioterror alerts, images of skin rashes, medical procedures – to emergency workers. In the first homeland security datacasting project in the country to work with a nuclear facility, the NJN datacasting system is being tested in the Emergency Planning Zone around the Oyster Creek Nuclear Generating Station. Working in

partnership with the New Jersey State Office of Emergency Management, NJN installed datacasting cards in the personal computers at Ocean County and Lacey Township Emergency Operation Centers. Once this project demonstrates the potential for very quick, efficient and robust distribution of emergency information to multiple receiving devices using NJN's digital television airwaves, it may be expanded to emergency centers across the state.

- Nashville Public Television (NPT) has launched Tennessee's first-ever DTV IPcasting system for education, homeland security and public service. Last year, NPT launched a demonstration of its ability to deliver local and regional public safety information for the Nashville Mayor's Office of Emergency Management, Nashville Fire Department and Tennessee Emergency Management Agency. This year, in conjunction with Nashville's Office of Emergency Management, NPT's new datacasting system -- called "MetroCast" -- will deliver video, audio and text alerts and information to first-responders.
- Partnering with the University of New Hampshire Cooperative Extension, the New Hampshire Library Association, and Volunteer NH, New Hampshire Public Television (NHPTV) designed a series of forums to help communities across the state create dialogue about emergency preparedness and related issues. The forums were held in eight separate communities each chosen for their unique emergency preparedness needs (rurality, proximity to a nuclear facility, accessibility by sea, etc.). Each meeting featured a question and answer session with local emergency management personnel to connect the broader message with local needs. The project was funded by a grant from the National Center for Outreach and drew on public television's tradition of convening communities through outreach.

B. Leveraging National Assets

Public television can also provide an effective national or regional alert and warning system over its national digital interconnection infrastructure and ubiquitous local transmission facilities.

PBS and public television stations are in the process of rebuilding a system of satellite and terrestrial links to interconnect with PBS and each other in the digital era. This system, a hybrid of satellite and terrestrial distribution, is flexible and scalable, designed to keep pace as technology evolves, and supports future content demands for multi-channel, high-definition, datacasting and other digital initiatives. In addition, it is

national in scope but with a local reach that is universally accessible to rural and urban communities alike.

APTS believes public television stations will play an important role in supporting a Digital Broadcast EAS system through the digital interconnection infrastructure public broadcasting is developing. The Next Generation Interconnection System (NGIS) will serve as a vital link between the Public Broadcasting Service (PBS) and local public television stations. The NGIS will leverage new digital technologies to create and deploy a platform that will, in addition to providing a central distribution platform, enable two-way and point-to-point communications. Because NGIS is designed to link local digital stations within a national digital infrastructure, this system can be leveraged to support a national homeland security alert system. NGIS is a critical component of the ongoing transition from analog to digital broadcast technology. It provides the national architecture to link the digital assets that local communities, state governments and the federal government have invested in across the country. In this regard, as public television moves forward to build its digital interconnection system, an opportunity exists for its cooperative use by both public television and DHS/FEMA to enhance the effectiveness of EAS.

In September 2004, APTS signed an agreement to work cooperatively with the Federal Emergency Management Agency (FEMA) to demonstrate how datacasting over a public television station's digital transmission can enhance the effectiveness of the Emergency Alert System (EAS). Partners in the project include PBS and local stations WETA/Washington, WHRO/Richmond, Maryland Public Television, and the New Jersey Network. The goals of the six-month pilot program were to support the authorized

distribution of digital all-hazards EAS messages, by secure and non-secure means, to televisions, radios, personal computers, wireless networks, direct satellite and other transmission media. The demonstrations used FEMA-generated EAS test messages sent through selected public television access points and then immediately broadcast to a variety of relays and/or end-user devices.

The six-month pilot was such an unqualified success that the Department of Homeland Security has recently signed a six-month extension with APTS to plan the roll-out of a national Digital Emergency Alert System using the public television digital infrastructure as a critical element.

VI. Public Television Requires Carriage of Digital Signals on Direct Broadcast Satellite Platforms

In light of the significant public interest benefits of noncommercial educational digital services, public television respectfully requests that satellite companies such as DIRECTV and EchoStar be required to carry all free, over-the-air digital signals where local television stations are being carried pursuant to SHVIA. Carriage should include but not be limited to both high-definition programming and all multicast digital programming.

A. Digital Carriage on Satellite is Authorized by Federal Law

Digital carriage is clearly consistent with the plain language of SHVIA's carry-one / carry-all construct. That provision states in relevant part:

[E]ach satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission

made by that station shall carry upon request the signals of all television broadcast stations located within that local market[.]¹²

Both section 122(j)(5) of the Copyright Act, and Section 338 of the Communications Act define in identical terms what television broadcast stations are eligible to be rebroadcast under this legislative scheme. Both provisions specifically reference all “over-the-air, commercial or noncommercial television broadcast station[s] licensed by the Federal Communications Commission under subpart E of part 73 of title 47, Code of Federal Regulations,” exempting only low-power or translator stations (which operate pursuant to part 74 of the Commission’s rules).¹³ As all digital broadcast television stations are licensed under part 73, subpart E,¹⁴ this would clearly place those stations within the ambit of SHVIA’s carry-one / carry-all mandate. The fact that only low-power or translator stations were specifically exempted from this provision underscores that no other exemptions were contemplated by the statute—including any purported exemption for digital television signals.¹⁵

¹² 47 U.S.C. § 338(a).

¹³ See 17 U.S.C. § 122(j)(5) and 47 U.S.C. § 338(k)(8) [referencing 47 U.S.C. § 325(b)(7)].

¹⁴ The DTV table of allotments is located at § 73.622 within subpart E of part 73 of the Commission’s rules. See 47 C.F.R. § 73.622.

¹⁵ In this regard, it is traditional principle of statutory construction that where a statute contains specific exceptions no other exceptions are to be implied. Sutherland Stat. Const. § 45.11 (6th Ed.) (collecting cases) and Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980). Although SHVIA’s legislative history indicates that Congress did not take any position regarding mandatory carriage of digital signals by satellite carriers, neither is there any evidence that digital signals were intended to be excluded. See Joint Explanatory Statement of the Committee of Conference on H.R. 106-1554, 145 Cong. Rec. at H11792, H11795 (Daily ed. Nov. 9, 1999). In addition, although Congress recently updated the law through the Satellite Home Viewer Extension and Reauthorization Act (SHVERA) to allow for carriage of significantly viewed signals and to require digital carriage in Alaska and Hawaii, importantly, much of the plain language of the carriage provisions remained the same. See The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) was enacted on December 8, 2004 as Division J, Title IX of the “Consolidated Appropriations Act, 2005,” Pub. L. No. 108-447, 118 Stat. 2809 (2004). In fact, Congress enacted a specific provision ensuring that the Commission’s authority regarding the DTV transition would remain unchanged. See SHVERA, Section 212: “SEC. 212. DIGITAL TRANSITION SAVINGS PROVISION. Nothing in the dates by which requirements or other provisions are effective under this Act or the amendments made by this Act shall be construed-- (1) to impair the authority of the Federal

Moreover, a natural reading of the statute should mandate that the carry-one/carry-all scheme apply to the entire digital broadcast signal, including programming in both high definition and multiple standard definition streams. As the Commission has recently made clear in a related proceeding, when the Satellite Home Viewer Improvement Act, as amended and extended by the Satellite home Viewer Extension and Reauthorization Act (SHVERA), refers to television broadcast “signals,” the use of the plural term “unambiguously mean[s] carriage of the entire free over-the-air digital broadcast, without limitation, being transmitted by a broadcaster.”¹⁶ Although the Commission addressed its conclusion to one part of Section 338 as it relates to carriage in Hawaii and Alaska,¹⁷ the reasoning applies equally well to another portion of Section 338 that applies to the rest of the country.¹⁸ Thus, at Section 338(a)(1), the statute refers to the same plural construction, namely “the *signals* of all television broadcast stations located within that local market.”¹⁹ To hold otherwise would be to refuse to read two portions of the same statute in *pari materia*.²⁰ In addition, to hold otherwise would be to impose an absurd construction on the statute, namely that the plural of the same word means different things in different places within the same section. It also would result in the same word meaning different things in different parts of the country as well. For

Communications Commission to take any action with respect to the transition by television broadcasters to the digital television service; or (2) to require the Commission to take any such action.”

¹⁶ Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act, Report and Order, FCC 05-159, ¶ 16 (August 23, 2005) (interpreting 47 U.S.C. § 338(a)(4) as amended by Pub. L. No. 108-447, § 210, 118 Stat. 2809 (2004)).

¹⁷ *Id.*

¹⁸ 47 U.S.C. § 338(a)(1).

¹⁹ 47 U.S.C. § 338(a)(1) (emphasis added).

²⁰ See NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (6th ed. 2000) (statutes on same subject should be construed together).

these reasons, the Commission should ensure full carriage of all HD and multiple SD content carried on the signals of all television broadcast stations carried pursuant to Section 338.

B. Digital Carriage on Satellite Will Speed the Digital Transition

In addition, digital carriage on satellite will aid in further speeding up the digital transition in this country. Analog broadcast television service is scheduled to be turned off at the end of 2006 unless 15 percent or more households cannot receive digital broadcast signals either over the air or through cable or satellite.²¹ Satellite subscribers account for over 20 percent of all TV households on average,²² and this figure is significantly higher in some markets. Accordingly, it is vitally important that satellite subscribers have access to digital broadcast signals in order for the digital transition to be a success within a reasonable period of time. In this regard, shortening the digital transition is especially important to public broadcasters, which must shoulder the substantial cost of dual analog-digital operations for an unknown period of time during the transition to digital.

C. Digital Carriage on Satellite is Consistent with Federal Policy Mandating that Public Television Has Access to All Telecommunications Technologies

Moreover, Congress has established the consistent federal policy that public television stations should have access to all telecommunications technologies, including

²¹ 47 U.S.C. §309(j)(14)(B).

²² Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11th Annual Report, FCC 05-13, Table B-1 (2005).

satellite-delivered services.²³ Within the cable context, Congress explicitly concluded that “the Federal Government has a substantial interest in making all nonduplicative local public television services available” (a) because public television provides educational and informational programming to the nation’s citizens, thereby advancing the Government’s compelling interest in educating its citizens; (b) because public television stations are intimately tied to their communities through substantial investments of local tax dollars and voluntary citizen contributions; (c) because the Federal government has invested substantially in the public broadcasting system; and (d) because without carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.²⁴ The reasons for this policy apply with equal force, regardless of whether the public television station is broadcasting in either analog or digital format.

D. Satellite Carriers Have Plans to Carry, and Will Soon Possess Sufficient Capacity to Carry, Digital Signals

While both satellite carriers have claimed that they lack the capacity to rebroadcast the digital signals of each local station in each of the 210 local markets,²⁵ both satellite companies are rushing to expand on their already substantial satellite capacity to provide more digital television programming in order to compete with cable.

²³ Congress has stated, for instance, that “it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.” 47 U.S.C. § 396(a)(9).

²⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Section 2(a)(8).

²⁵ See, e.g., Ex Parte Notice from Echostar, CS Docket No 98-120 (January 31, 2003); Ex Parte Notice from DIRECTV, CS Docket Nos. 98-120, 00-96 (February 25, 2003).

In this regard, it is undeniable that satellite carriers will soon possess the capacity to rebroadcast the digital signals of each local station in many of the 210 local markets.

For instance, early this year, DIRECTV again publicly stated in its Securities and Exchange Commission filings that one of its strategic goals is to expand HDTV programming to carry “more than 1,500 local and 150 national high-definition channels to all U.S. television households” through five additional satellites.²⁶ DIRECTV currently holds licenses to broadcast from 46 of 96 DBS frequencies allocated to it and holds an additional 64 Ka-band licenses as well.²⁷ It operates a fleet of seven satellites from its 72.5 °, 101°, 110° and 119° WL orbital slots and leases an additional satellite at 95° WL.²⁸ As part of its programming expansion strategy, the company will operate a total of seven new satellites, including the following:

Satellite	Status
SPACEWAY 1	Launched 2005 ²⁹
SPACEWAY 2	Expected launch 2 nd half of 2005 ³⁰
DIRECTV 10	Expected launch 2007 ³¹
DIRECTV 11	Expected launch 2007 ³²
DIRECTV 8	Launched 2005 (replacement for DIRECTV 2) ³³

²⁶ DIRECTV Group, Inc., Form 10-K, Securities and Exchange Commission, p. 6 (March 31, 2005).

²⁷ Id. at p. 5 and Letter from Dianne Smith, Special Projects Counsel, Capitol Broadcasting Company, to Marlene H., Dortch, CS Docket 98-120. pp. 4-5 (July 28, 2005).

²⁸ DIRECTV Group, Inc., Form 10-K, Securities and Exchange Commission, p. 8. (March 31, 2005).

²⁹ DIRECTV Group, Inc, Form 10-Q, Securities and Exchange Commission, p. 36 (August 5, 2005).

³⁰ Id.

³¹ DIRECTV Group, Inc., Form 10-K, Securities and Exchange Commission, p. 9 (March 31, 2005).

³² Id.

³³ DIRECTV Group, Inc, Form 10-Q, Securities and Exchange Commission, p. 36 (August 5, 2005).

DIRECTV 9S	Expected launch 2006 (backup for DIRECTV 4S AND 7S) ³⁴
DIRECTV 12S	Under construction as ground spare ³⁵

DIRECTV plans to roll out HD delivery of local channels in 12 markets in the Fall of 2005,³⁶ including the following: New York City, Los Angeles, Chicago, Philadelphia, Boston, San Francisco, Dallas, Washington, Atlanta, Detroit, Houston and Tampa.³⁷ By the end of 2005, DIRECTV expects to have local HD carriage in 30-40 markets.³⁸

Similarly, EchoStar also has plans to significantly expand its already extensive capacity to carry local digital signals.³⁹ EchoStar has acquired the rights to Voom's HD networks, has already added 10 of those 21 networks to its slate of HD programming, and expects to carry the remaining channels in early 2006.⁴⁰ EchoStar CEO Charlie Ergen has stated that its current technological assets will allow the company to carry approximately "50 HD channels and 20 local markets, up from the 20 national channels

³⁴ DIRECTV Group, Inc., Form 10-K, Securities and Exchange Commission, p. 8 (March 31, 2005).

³⁵ Id. at p. 33.

³⁶ Mark Seavy, "DIRECTV Readies Local HD Rollout in 12 Markets in Fall," Communications Daily (March 31, 2005).

³⁷ Satellite, Communications Daily (April 27, 2005).

³⁸ Mark Seavy, "DIRECTV Expects to Have Local HD Available in 30-40 Markets." Communications Daily (June 2, 2005) (quoting DIRECTV CEO Chase Carey).

³⁹ EchoStar has stated that it has plans after the DTV transition to "make available the down-converted HDTV feed of the local stations in the same number of DMAs [in which it is currently providing local service] that will be served at that time." Reply Comments of EchoStar, MB Docket 04-210, p. 9.

⁴⁰ Adrienne Kroepsch, "EchoStar Wants to 'See the Playing Field' Before Making HDTV and Broadband Bets," Communications Daily (May 6, 2005) (quoting EchoStar CEO Charlie Ergen).

they provide now.”⁴¹ Alternatively, EchoStar could provide 30 local markets and 30 national channels instead. Either way, Mr. Ergen has committed that there will be more HD capacity “on the way each year.”⁴²

Like its competitor, EchoStar possesses substantial spectrum and infrastructure assets. EchoStar currently has licenses to transmit on 96 DBS frequencies and has or leases additional licenses in the FSS band for 56 additional frequencies.⁴³ In addition, EchoStar was the winning bidder for the remaining 29 DBS frequencies at the 157 degree orbital location at the FCC auction conducted in July of 2004.⁴⁴

The company owns and operates nine in-orbit satellites and leases an additional three satellites from SES Americom.⁴⁵ Two of those SES Americom satellites have HD capabilities: AMC-15 and AMC-16.⁴⁶ Echostar also has contracts for the construction and launch of four new satellites of unspecified technical capacity: EchoStar 10 (expected launch at end of 2005); EchoStar 11 (expected construction final by 2007); and two additional satellites (expected construction final by 2008).⁴⁷ In addition, EchoStar has entered into satellite service agreements to lease capacity on two additional satellites that are under construction. One will be an SES Americom satellite (expected launch

⁴¹ Id.

⁴² Id.

⁴³ EchoStar Communications Corp, Form 10-K, Securities and Exchange Commission, pp.5-6 (March 16, 2005).

⁴⁴ Id. at p. 6.

⁴⁵ Id. at p. 5.

⁴⁶ Satellite, Communications Daily (April 27, 2005) (“EchoStar is leasing 2 satellites with HD capabilities from SES Americom, AMC-15 and AMC-16”).

⁴⁷ EchoStar Communications Corp. Form 10-K, Securities and Exchange Commission, p. 8-9 (2005).

date 2006); and the other a satellite whose operator is unspecified (expected launch date 2006).⁴⁸

Other additional EchoStar spectrum assets include the following:

- Newly approved licenses for two new satellites in the “extended Ku-band,” at 109° (32 transponders) and 121° (16 transponders) WL, an expansion which it admits is designed to deliver more local high-definition television programming.⁴⁹
- Ka-band licenses at 97°, 113° and 117° WL.⁵⁰
- The purchase of 11 DBS frequencies at 61.5° from Cablevision’s HD satellite VOOM service (using the Rainbow 1 satellite).⁵¹
- A sublease of six transponders at 61.5 from licensee Dominion Video Satellite, Inc.⁵²

No doubt, the present and future spectrum holdings of these satellite companies are by any stretch of the imagination quite substantial and will allow both EchoStar and DIRECTV to devote considerable capacity for the rebroadcast of digital signals.

⁴⁸ Id. at p. 10.

⁴⁹ See In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch and Operate a Geostationary Satellite Using the Extended Ku-band Frequencies in the Fixed-Satellite Service at the 109° W.L. Orbital Location, Order and Authorization, DA 04-3163, ¶ 2 (Sept. 30, 2004). This satellite will operate with 32 transponders each of 27 megahertz useable bandwidth, allowing for full frequency reuse of the 500 megahertz downlink frequencies and four-fold frequency reuse of the 250 megahertz uplink frequencies. Id. at ¶ 3. See In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch and Operate a Geostationary Satellite Using the Extended Ku-band Frequencies in the Fixed-Satellite Service at the 121° W.L. Orbital Location, Order and Authorization, DA 04-3164, ¶ 2 (Sept. 30, 2004). This satellite will operate with 16 transponders each of 27 megahertz usable bandwidth. Dual orthogonal polarization will be used to give full frequency reuse of the uplink and downlink spectrum. Id. at ¶ 3.

⁵⁰ EchoStar Communications Corp., Form 10-K, Securities and Exchange Commission, p. 15 (2005).

⁵¹ Press Release, “EchoStar to Purchase Satellite from Cablevision,” (January 20, 2005) (announcing purchase of Rainbow 1, a direct broadcast satellite located at 61.5 degrees W.L. together with rights to 11 DBS frequencies at that location), available at: http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=665115. The satellite includes 13 frequencies, up to 12 of which can be operated in “spot beam” mode. Id. Rainbow also recently paid \$3.2 million at auction for a DBS license at 175° WL and \$3.2 million for a DBS license at 166° WL, properties that were not apparently bought by EchoStar. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Video Competition Report, FCC 05-13, ¶ 62 (February 4, 2005) (“Eleventh Video Competition Report”). In addition, VOOM has contracted with Lockheed Martin for the construction of five Ka-band satellites to be operated at orbital locations 62° WL, 71° WL, 77° WL, 119° WL, and 129° WL. Eleventh Video Competition Report, at ¶ 63.

⁵² EchoStar Communications Corp., Form 10-K, Securities and Exchange Commission, p. 15 (2005).

Moreover, recent technical submissions to the FCC and Congress have demonstrated that there are additional technologically feasible means to deliver terrestrial digital signals via satellite.⁵³ For instance, the National Association of Broadcasters has argued that satellite firms have available to them a wide range of potential new techniques for expanding their capacity,⁵⁴ including the following:

- **Spectrum sharing between DIRECTV and EchoStar either directly or through a third-party intermediary.**⁵⁵ This could include the use of a shared satellite operated by an independent entity. In this regard, Section 108 of SHVERA establishes a fast-track processing requirement at the Department of Justice for antitrust review of any arrangement between two or more satellite providers that wish to cooperate in bringing local-into-local service into a market.⁵⁶
- **Use of Ka-band as well as Ku-band spectrum.** Based on its extensive experience in this field, Capitol Broadcasting recently stated that “[U]sing technology now available, or that will be available during calendar 2004, both EchoStar and DIRECTV could each deliver ALL full-power 19.4 digital stations using only one of their Ka-band orbital slots and two spot beam satellites.”⁵⁷
- **Higher-order modulation and coding and compression.** The FCC recently observed that the use of MPEG-4 encoding and 8PSK modulation could yield

⁵³ See Reply Comments of the National Association of Broadcasters, Federal Communications Commission, MB Docket No. 03-172 (Sept. 26, 2003); and Letter from Dianne Smith, Capitol Broadcasting Company to Marlene Dortch, Federal Communications Commission, CS Docket 98-120 and MB Docket 03-15 (January 22, 2004). See also Written Testimony of Robert G. Lee, President and General Manager of WDBJ-TV, on behalf of the National Association of Broadcasters, Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, pp. 20-22 (February 24, 2004).

⁵⁴ Written Testimony of Robert G. Lee, President and General Manager of WDBJ-TV, on behalf of the National Association of Broadcasters, Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, p. 21 (February 24, 2004).

⁵⁵ See, e.g., Letter from Dianne Smith, Capitol Broadcasting Company to Marlene Dortch, Federal Communications Commission, CS Docket 98-120 and MB Docket 03-15 (January 22, 2004).

⁵⁶ Division J, Title IX of the “Consolidated Appropriations Act, 2005,” Pub. L. No. 108-447, 118 Stat. 2809, Div. J, Title IX, Section 108 (2004), codified at 17 U.S.C. § 119(f).

⁵⁷ Letter from Dianne Smith, Capitol Broadcasting Company to Marlene Dortch, Federal Communications Commission, CS Docket 98-120 and MB Docket 03-15 (January 22, 2004).

significant capacity enhancements.⁵⁸ Recently, DIRECTV has signed a deal with Tanberg for HD advanced compression technology using MPEG-4 enabled transponders.⁵⁹

- **Closer spacing of Ku-band DBS satellites.** Currently, DBS satellites in the Ku-band are licensed at approximately 9° apart. The FCC has sought comment on allowing shorter orbital spacing between satellites, i.e. 4.5° apart, which could substantially increase the number of DBS satellites operating over the United States.⁶⁰ This issue is pending at the Commission and should be resolved in favor of closer spacing if the Commission determines that interference between satellites operating at closer spaced orbital locations would not be an issue.
- **Satellite dishes pointed at multiple orbital slots.** This would involve the use of larger circular or elliptical dishes (or multiple dishes) capable of receiving signals from more than one satellite. Both DIRECTV and EchoStar use this type of equipment for consumers who subscribe to a HD-package.⁶¹

In light of the significant public benefits that carriage of digital signals would bring to the American public, the Commission should immediately rule that the plain language of SHVIA's carry-one/ carry-all scheme applies to digital signals just as much as it applies to analog signals. As the technical discussion above demonstrates, both DIRECTV and EchoStar possess or will soon possess ample ability to carry the digital signals of local television stations in all 210 markets in the near future. Moreover, as the digital transition progresses and analog signals cease, more satellite capacity that would ordinarily be occupied by digitized analog feeds could be repurposed to carry additional

⁵⁸ Further video capacity enhancements will come from a gradual migration to advanced transmission codecs such as MPEG-4, higher order modulations such as 8PSK, and the use of new frequency bands." Eleventh Video Competition Report, at ¶ 63.

⁵⁹ Communications Daily, Satellite (February 16, 2005).

⁶⁰ See International Bureau Seeks Comment on Proposals to Permit Reduced Orbital Spacings Between U.S. Direct Broadcast Satellites, Public Notice, Report No. SPB-196 (rel. Dec. 16, 2003); and Comments of EchoStar, MB 04-227, p. 3 (July 23, 2004) (discussing feasibility of reduced orbital spacing in the DBS band and its application for four satellites at 4.5° intervals).

⁶¹ See http://www.DIRECTV.com/DTVAPP/imagine/Imagine_Standard_Receiver.dsp; and Communications Daily, Satellite (May 5, 2003) (discussing EchoStar's "super dish" elliptical receiving dish capable of receiving HD signals from an FCC satellite).

digital terrestrial feeds, further lessening the impact of mandatory carriage on the satellite infrastructure.

VII. Public Television Requires Carriage of its Signals on RBOC-Deployed Fiber-TV Platforms

A number of Regional Bell Operating Companies (RBOCs) – most notably Verizon and SBC are deploying fiber-based IP networks over existing rights-of-way to deliver multichannel video and other services to small businesses and residential customers.⁶² While the RBOCs had previously attempted to make forays into the video market, neither the infrastructure nor the consumer demand allowed such an attempt to succeed. However, recently both of these factors have changed substantially with the increased demand for broadband and the availability of fiber optics. Accordingly, RBOCs have been investing in fiber-to-the-premises (FTTP) and fiber-to-the-node (FTTN) infrastructure with great speed.⁶³ It is estimated that by 2010 this infrastructure build-out could support a new multichannel video service that is competitive with both cable and satellite.⁶⁴

⁶² Almar Latour, “New Kid on the Box: To meet the Threat From Cable, SBC Rushes to Offer TV Service,” Wall Street Journal, p. A1 (Feb. 16, 2005). Smaller telephone companies, such as Pioneer Telephone Cooperative in Oklahoma, and others, have also entered the video market. Carol Wilson, “Telco video: is the third time charmed?” Telephony Online (July 11, 2005), available at: http://www.telephonyonline.com/mag/telecom_telco_video_third/index.html.

⁶³ Fiber-to-the-premises (FTTP) provides a fiber connection from the customer premises to the RBOC delivery platform. Fiber-to-the node (FTTN), provides fiber facilities to the neighborhood node, and coaxial cable from the neighborhood node to the consumer residence. Eleventh Video Competition Report, n. 577.

⁶⁴ Indeed, Convergence Consulting Group has estimated that the RBOCs could acquire a million video customers by the end of next year and 4 million by the end of 2008—the latter being the equivalent of five percent of cable’s current subscriber base. Mavis Scanlon, “The Telcos Are Coming ... Really, They (Say They) Are,” CableWorld (March 7, 2005), available at:

It is reported that Verizon will unveil plans for its fiber-based multichannel TV service—called FiOS TV—later in 2005. The company has indicated it will deploy fiber to 3 million homes by the end of 2005.⁶⁵ FiOS TV service will be modeled on cable.⁶⁶ Accordingly, the lead offering of FiOS TV will be a national programming package with local market insertion, which will be competitive with cable's expanded basic package. Like satellite, every customer will be digital. Like cable, Verizon will pitch video on demand as a key point of distinction.⁶⁷ Additionally, Verizon will also offer as many premium multiplex channels as possible.⁶⁸ Eventually, the company plans to add more advanced IP-based interactive services that will allow, for example, customization of the interactive programming guide and content searches from PCs and other devices.⁶⁹

www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=030705&file=tecossarecomingreally.htm. Similarly, Craig Moffet of Bernstein Research predicts that the RBOCs could achieve greater than six percent share of the pay-TV business by 2010. Michael Hopkins, "Fiber: More than 40 Million Homes by 2010? Projections Suggest RBOC Fiber Could Reach 33.7% of Home in 5 Years," *The Bridge*, p. 5 (March 4, 2005) (quoting Richard Greenfield of Fulcrum Global Partners). In this regard, he predicts that as the multichannel market grows at two percent annually, RBOC-deployed fiber-based TV platforms could take more than half of that growth. *Id.*

⁶⁵ See Michael Hopkins, "Fiber Rollouts Yesterday, Today and Tomorrow: Telcos Move on Infrastructure Delivering Advanced Services," *The Bridge* (February, 2005), <http://www.mbc-thebridge.com>; "Verizon Offers FiOS Service to Communities in Northeast and Mid-Atlantic," Press Release, Verizon (Feb. 4, 2005), www.verizon-media.com/iweb/news/20050204.shtml; Verizon Communications, Verizon Signs TV Exec to Guide Video Projects (press release) (Sept. 15, 2004); and Eleventh Video Competition Report, ¶ 128.

⁶⁶ Verizon Vice President of programming and marketing for FiOS TV, Terry Denson (formerly of Insight Cable), is "taking his cues from cable and satellite in designing Verizon's programming options." Mavis Scanlon, "The Telcos Are Coming ... Really, They (Say They) Are," *CableWorld* (March 7, 2005), available at: www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=030705&file=tecossarecomingreally.htm.

⁶⁷ In late February, Verizon announced a long-term agreement with TVN, which will provide the RBOC with VOD programming." *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* This would include, for example, the viewing of digital photos on TV, connections to wireless phones, PCs and Xbox gaming platforms. *Id.*

Through its “Project Lightspeed” initiative, SBC Communications is building fiber-to-the-node technology for developed areas and fiber-to-the premises for new developments. The company is aiming for 18 million households passed with fiber by 2007, representing about half of the households in its 13-state territory. SBC intends to use this infrastructure to offer a subscription package of bundled television, telephone, broadband and possibly wireless services, called “U-verse.”⁷⁰ The packet-based IP video network would enable a more flexible linear channel offering with HD, VOD and true interactive TV, as well as high-speed data.⁷¹ For instance, SBC has announced that the IP-based TV service would include instant channel changing, customizable channel lineups, video on demand, digital video recording, multimedia interactive program guides, event notifications, and content protection features.⁷² Additionally, by using IP technology to deliver video, voice, data and other advanced services and applications over a single network connection, the services may be accessed and shared via any number of IP-enabled household devices, such as TVs, set-top boxes, PCs, PDAs or phones.⁷³ SBC will not offer U-verse commercially until the end of 2005 or later.

Advocates for cable interests have cogently argued that the 1996 Telecommunications Act permits local telephone common carriers to provide video

⁷⁰ Howard Buskirk, “SBC’s U-verse Brand Unveiled Following Spate of Announcements,” *Communications Daily* (Jan. 7, 2005).

⁷¹ Mavis Scanlon, “The Telcos Are Coming ... Really, They (Say They) Are,” *CableWorld* (March 7, 2005), available at: www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=030705&file=tecosarecomingreally.htm

⁷² SBC Communications Selects Microsoft TV For Advanced IP Television Service, Press Release (Nov. 17, 2004), available at: <http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21463>.

⁷³ *Id.*

services in their telephone service areas through only one of four regulatory categories⁷⁴:

(a) as a wireless radio service subject to Title III;⁷⁵ (b) as a common carrier regulated under Title II;⁷⁶ (c) as a cable system subject to Title VI;⁷⁷ or (d) by means of an open video system ("OVS").⁷⁸ Cable advocates correctly argue that the text of Section 651 of the Communications Act of 1934, as amended by the 1996 Telecommunications Act, makes it clear that these categories are exclusive.⁷⁹ The only limited exception applies to video programming provided by a carrier that has received approval as an open video system, in which case a reduced range of Title VI obligations applies.⁸⁰

SBC, however, has claimed that its fiber-based network is not subject to regulation under any of the traditional Telecom Act categories and instead should be considered an unregulated "information service."⁸¹ As a consequence, it believes that the range of Title VI obligations does not apply to it.⁸² Most recently, however, SBC has argued that many of the Title VI obligations that attach to a multichannel video

⁷⁴ "Applicability of Title VI to Telco Provision of Video Over IP," National Cable and Telecommunications Association, Letter to Donna Gregg, Chief, Media Bureau, FCC, WC Docket 04-36, pp. 6-7 (July 29, 2005) ("NCTA Letter")

⁷⁵ 47 U.S.C. § 571(a)(1).

⁷⁶ 47 U.S.C. § 571(a)(2).

⁷⁷ 47 U.S.C. § 571(a)(3).

⁷⁸ 47 U.S.C. § 571(a)(3)-(4).

⁷⁹ NCTA Letter, p. 7. In this regard, Section 651 states that "to the extent that a common carrier is providing video programming to its subscribers in any manner other than" as a Title III wireless operator or as a Title II common carrier, "such carrier shall be subject to the requirements of this title," namely Title VI. 47 U.S.C. § 571(a)(3).

⁸⁰ 47 U.S.C. § 571(a)(3). See also NCTA Letter, pp. 15-16.

⁸¹ Linda Haugsted, "Regulation Machinations: Telcos Challenge Rules of Engagement as They Expand Territory into Video," Multichannel News, p. 27 (Feb. 21, 2005). See also, 47 U.S.C. § 153(20) (definition of "information service").

⁸² Latour, p. A10. See also Anne Veigle, "Verizon Applies for Cable Franchises in 3 States," Communications Daily (Jan. 5, 2005).

programmer do in fact apply to its operation when it provides such a service (e.g. closed captioning, retransmission consent rules and equal employment opportunity standards), but that because its service is not a traditional one-way cable service, some of those obligations that are specifically related to cable services do not apply.⁸³ In particular, SBC has objected to being subject to franchising requirements, and it is unclear whether it accepts mandatory carriage of stations that do not elect retransmission consent.⁸⁴

SBC argues that its future service is a largely interactive on-demand interface with its customers, placing it outside the bounds of the Communication Act's definition of a cable service, which defines traditional cable to be a largely unidirectional service.⁸⁵ Importantly, the argument for this position relies on the assumption that the service is

⁸³ Letter from James C. Smith, SBC, to Marlene H. Dortch, with attached document, "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services," WC Docket No. 04-36, pp. 12-14 (Sept. 14, 2005).

⁸⁴ In this regard, SBC has pledged that "With respect to the distribution of broadcast signals, SBC's actual service offering will be in compliance with applicable carriage and retransmission arrangements with broadcasters." *Id.* at p. 23, n. 64. This statement could be read in one of two ways. Either it represents a commitment to abide by FCC must-carry rules that implement Section 614 and 615 of the Communications Act, 47 U.S.C. §§534, 535, or it could represent merely a pledge to abide by any retransmission agreement SBC signs with broadcasters.

⁸⁵ See "Comm Daily Notebook," *Comm. Daily* (April 15, 2005) (reporting comments of attorney Bill Richardson articulating arguments of SBC). In this regard, the Communications Act defines a "cable service" as:

"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service[.]"

47 U.S.C. § 522(6). The argument therefore would state that (a) because the TV service does not constitute a "one-way transmission," and (b) because subscriber interaction is required beyond the simple selection of programming or access to programming (e.g. via an electronic program guide), the SBC "U-verse" service is not a cable service under the above definition. Similarly, SBC could also refer to the definition of "cable system" in the Communications Act, which similarly states that the "facility of a common carrier ... shall be considered a cable system ... to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is *solely* to provide interactive on-demand services[.]" 47 U.S.C. § 522(7) (emphasis added).

solely designed to provide an interactive on-demand experience.⁸⁶ However, cable advocates have correctly argued that the multichannel video services that SBC and Verizon have publicly described are in many instances the functional equivalent of traditional cable services. Like cable systems, these TV-over-fiber offerings will involve – at least in part-- the unidirectional retransmission of local and national TV signals, aggregated at headends and distributed to subscribers.⁸⁷ Also, the infrastructure in many instances is no different than those cable systems that have upgraded to fiber-optics or hybrid fiber-coax systems.⁸⁸ In addition, some cable systems also use a “switched IP” method of retransmission for some of its on-demand services that is no different than some of the interactivity predicted to come with RBOC multichannel video services.⁸⁹

Moreover, the claim that a RBOC multichannel video service would be used *solely* to provide an interactive on-demand experience is belied by one additional but significant factor. Under federal compulsory copyright license that applies to cable systems, RBOCs may either (a) provide a simultaneous and unedited pass-through of local television broadcast signals without paying royalties or otherwise negotiating for rights clearances,⁹⁰ or (b) in the absence of such a license, provide an on-demand interactive service while clearing the rights to each program provided and paying appropriate fees negotiated with each copyright holder. A business model based on the former is a lot easier to manage than one based on the latter, because it is typically an

⁸⁶ See note 85, *supra*.

⁸⁷ NCTA Letter, pp. 9-10.

⁸⁸ NCTA Letter, p. 12.

⁸⁹ NCTA Letter, p. 13-14.

⁹⁰ See 17 U.S.C. § 111(c)(basic license); 17 U.S.C. § 111(f)(defining the “secondary transmission” to require simultaneous retransmission of the broadcast signal); 17 U.S.C. § 111(c)(3)(no alteration allowed); and 17 U.S.C. § 111(c)(1) and (2)(A).

extremely difficult proposition (although not impossible) to negotiate for and clear the rights for all programming and all copyrightable elements within such programming. It is therefore unlikely that the RBOCs are relying solely on a business model whose central feature is a wholly interactive on-demand multichannel service, despite their public statements to the contrary.

Therefore, to the extent that these future multichannel video programming services largely mimic the services that traditional cable systems provide to consumers, the Commission should apply current law and policy in a straightforward manner to regulate these services on an equivalent basis with cable. This means that at a minimum the Commission should hold that Section 615 of the Communications Act applies to RBOC-deployed fiber-based multichannel TV platforms.

If the Commission were to hold that the mandatory carriage provisions of Section 615 apply to RBOC-deployed multichannel television services, the Commission should ensure that the entirety of the digital broadcast signal – including both high-definition and, where applicable, multiple standard definition signals—should be carried. In this regard, APTS acknowledges that the Commission has previously ruled that only a single stream of programming must be carried by a traditional cable system. However, this ruling was based on a close reading of the statute designed to avoid an apparent unconstitutional burden on cable capacity.⁹¹ No similar burden exists with RBOC-deployed fiber-based multichannel services, which can deliver data, depending on the use and system architecture, at speeds far exceeding that of the traditional cable coaxial infrastructure. Moreover, while there was evidence in the cable must-carry proceeding

⁹¹ See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, FCC 05-27, ¶¶ 37 et. seq. (February 23, 2005).

that cable systems were in fact carrying many stations pursuant to privately-negotiated agreements, and in particular that public television stations were being carried pursuant to a national agreement,⁹² no such national or local agreement has been struck between public television and RBOCs for carriage of either analog or digital signals.

Conclusion

Public television stations play a unique role in delivering noncommercial educational and public safety services to local communities throughout America. To ensure the continuity of these services, the Commission should promulgate rules to ensure the fair and full carriage of local digital signals on direct broadcast satellite systems. Moreover, as the RBOCs enter the multichannel video programming market by providing services that function in the same ways as cable, they should be regulated like traditional cable systems by the Commission, including the application of mandatory carriage provisions pursuant to Section 615 of the Communications Act.

Respectfully submitted,

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September 19, 2005

⁹² Id. at ¶ 38.